Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center *and* Nevada Service Employees Union, Local 1107, affiliated with Service Employees International Union. Cases 28–CA–20805, 28–CA–20806, 28–CA–20807, 28–CA–20808, 28–CA–20854, 28–CA–20861, 28–CA–20877, 28–CA–21014, and 28–CA–21115

February 19, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On July 12, 2007, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed an answering brief, a limited cross-exception, and a brief in support; and the Charging Party filed an answering brief, exceptions, and a brief in support.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, rescind the warnings issued to Registered Nurse Christina Schofield and the discharge of Schofield and offer her full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent job without prejudice to her seniority or any other rights or privileges previously enjoyed; remove from its files any reference to the warnings and discharge, and within 3 days thereafter notify Christina Schofield in writing that this has been done and that the warnings and discharge will not be used against her in any way."

2. Substitute the following for paragraph 2(b).

"(b) Make whole Christina Schofield for any loss of earnings and other benefits suffered as a result of the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III of his decision, the judge incorrectly stated the date that a decertification petition was filed. The petition, which was pending at the time of the hearing, was filed on March 22, 2007.

[2] In adopting the judge's conclusions, we find it unnecessary to rely on labor consultant Yessin's conduct toward Christina Schofield to support the finding of animus, as Yessin's agency status was not litigated.

Although the judge did not specifically analyze the Respondent's warnings to Schofield under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), we find that the record also supports the conclusion that the warnings were unlawful under a *Wright Line* standard. Further, the Respondent asserts that it treated Schofield as it had treated other similarly situated employees in the past. We note that the Respondent failed to comply with the General Counsel's subpoena of documents describing such past disciplinary action.

To establish a violation under *Wright Line*, the General Counsel bears the burden of showing that union animus was a motivating or substantial factor for the adverse employment action. The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065–1066 (2007). Member Schaumber notes that the Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co*., 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation analysis, Member Schaumber agrees with this addition to the formulation, which the judge applied in analyzing the circumstances of Schofield's discharge.

Member Schaumber disagrees with the judge's statement that "an employer's failure to conduct a meaningful investigation of the alleged wrongdoing of the employee who is under scrutiny and the failure to give the employee an opportunity to explain his conduct *is* an indication of discriminatory intent [emphasis added]." In Member Schaumber's view, that is not the law. Such a failure *may* be evidence of discriminatory intent if it reflects disparate treatment of the individual at issue. If the employer regularly fails to engage in what the Board considers to be a "meaningful" investigation of employee wrongdoing, then its failure to engage in such an investigation in a particular instance reveals little about discriminatory motive. As the courts have frequently reminded us, "employers are not obligated to 'investigate' [employee misconduct] in any particular way," and it is not the Board's province to "function as a ubiquitous 'personnel manager,' supplanting its judgment on how to respond to [employee misconduct] for those of an employer." *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 310 (D.C. Cir. 2006) (internal citations omitted). Notwithstanding that, the record evidence here amply supports the judge's finding that the discipline and discharge of Schofield violated the Act.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

discrimination against her, in the manner set forth in the remedy section of the decision."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue unlawful verbal and written warnings to our employees because of their engagement in protected concerted activities.

WE WILL NOT discharge our employees because of their engagement in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful warnings and discharge of Christina Schofield and offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Christina Schofield whole for any loss of earnings and other benefits as a result of the discrimination against her, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings issued to Christina Schofield and the discharge of Christina Schofield, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful actions will not be used against her in any way.

VALLEY HEALTH SYSTEM, LLC D/B/A DESERT SPRINGS HOSPITAL MEDICAL CENTER

Joel C. Schochet, Esq., for the General Counsel.
Raymond J. Carey, Esq., for the Respondent.
Glenn Rothner, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Las Vegas, Nevada, on April 17 and 18, 2007. The complaint is based on charges filed by Local 108, affiliated with Service Employees International Union (the Charging Party or the Union), in Cases 28–CA–20805, 28–CA–20806, 28–CA–20807, 28–CA–20808, 28–CA–20854, 28–CA–20861, 28–CA–20877, 28–CA–21014, and 28–CA–21115, against Desert Springs Hospital Medical Center, herein described by its correct name, Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center (the Respondent or the Hospital). The complaint alleges violations of the National Labor Relations Act (the Act). The complaint is joined by the answer filed by the Respondent wherein it denies the commission of any violations of the Act.

After due consideration of the testimony and evidence received at the hearing and the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits, and I find, that at all times material the Respondent has been a Delaware limited liability company, with an office and place of business in Las Vegas, Nevada, engaged in the operation of a hospital providing inpatient and outpatient medical care, that during the 12-month period ending May 4, 2006, the Respondent in conducting its aforesaid business operations derived gross revenues in excess of $250,000, and purchased and received at its facility goods valued in excess of $5000 directly from points outside the State of Nevada and has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION[1]

The complaint alleges, Respondent admits, and I find, that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

[1] The following employees of the Respondent (the RN unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All Registered Nurses employed by the Respondent, including all relief charge nurses; excluding all other employees, guards and supervisors, including charge nurses as defined in the Act.

On or about October 3, 1994, the Union was certified as the exclusive collective-bargaining representative of the RN unit and has since then been recognized as such representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which became effective on February 22, 2007, and is currently in force.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A substantial part of the allegations in this consolidated complaint have been resolved by settlement and dismissed leaving for resolution only the various allegations of 8(a)(1) and (3) violations concerning Registered Nurse Christina Schofield. These remaining allegations concerning Schofield are as follows:

1. On or about May 1, 2006, Respondent revoked its permission for Schofield to park in the physicians' parking lot at the Respondent's facility.
2. On or about May 30, 2006, the Respondent issued Schofield an unwarranted verbal warning.
3. On or about July 3, 2006, the Respondent issued Schofield an unwarranted written warning.
4. On or about September 29, 2006, the Respondent discharged Schofield.

In early April 2006, the Union and the Respondent commenced bargaining for a successor collective-bargaining agreement (c/b/a) to the existing agreement which was set to expire by its terms on April 30, 2006. In April 2006, Cristina Schofield became a member of the Union's negotiating committee. She also was a member of the Union and management committee under the existing c/b/a. The bargaining for a successor agreement was contentious and Schofield was a supporter of the Union during the bargaining. She was one of five nurses who called themselves the "truth squad" whose photographs and comments appeared in the Union's literature. Schofield was active in distributing the union literature which she caused to be distributed to the registered nurses by placing it on union bulletin boards with the approval of Respondent's management. Her role as a union advocate did not go unnoticed. She was told by her supervisor, Matthew Grimes, that he had been told by Respondent's management to watch her and that he would write her up for any infractions. The General Counsel contends that although Schofield had an unblemished record since becoming a regular employee in June 2004, that she became the recipient of discipline from the Hospital management that occurred in less than a 5-month period after she became more active on behalf of the Union's position on the contract negotiations in April 2006. She received verbal and written warnings and was discharged on September 29, 2006, for alleged "insubordination." The General Counsel asserts that the timing of the disciplinary actions taken against Schofield supports a finding that these actions taken against Schofield were in retaliation for her support of the Union. The General Counsel also notes comments made by Respondent after certain of the nurses filed a petition to decertify the Union on February 22, 2007. On April 3, 2007, the Respondent directed a letter to the nurses' bargaining unit employees proclaiming that "the future arrived at Desert Springs" on March 22, 2006, when certain of the unit employees filed a petition to decertify the Union.

Schofield testified that for almost 2 years she had parked in a parking lot referred to as the physicians' parking lot and that other nonphysicians also parked in the lot as well. In its brief, the General Counsel contends that unit employees parked in this lot as well. However, there is little support in the record for this contention. The physicians' parking lot is described in the record as being the northwest lot. Schofield testified that the parking lot was on the northwestern side of the hospital and was not designated for physicians and that she and Chief Executive Officer (CEO) Sam Kaufman, had routinely seen each other park on this lot which operates with a cardkey entry to open the gate and that she used her employee badge card to open the gate as any type of card would open the gate. She testified that this was related to her by Dr. Mohammed Amad, a doctor on the Hospital's staff with whom she has a relationship. She testified that she had not been previously told that she could not park in the lot. However, in early May 2006, Kaufman barred her from the use of the parking lot. Kaufman testified that there are three parking lots which are limited to physician parking. There are signs stating, "No Parking, Doctors Only." This prohibition of the use of the parking lot by Schofield occurred shortly after she had become a member of the Union's bargaining committee in April 2006. Kaufman testified that parking on the physicians' parking lot is limited to doctors and members of the Hospital's executive team.

The General Counsel contends that the revocation of the parking lot privilege is a violation of the Act. I find, however, that the Respondent did not violate the Act by advising Schofield that she could not park on the lot. As noted above, the record does not support the General Counsel's contention that unit employees were permitted to park on the lot. I find as contended by the Respondent that it had designated this lot for physician parking and for executive department heads as testified to by Kaufman. Although Schofield testified she saw other unit employees park on this parking lot, I find that the evidence is insufficient to support a finding that Schofield had somehow acquired permission to park in the parking lot which was designated for physician parking. Accordingly, I find that Respondent did not violate the Act when it ordered Schofield to refrain from parking on the lot.

As noted above in April 2006, the Union and the Respondent were negotiating a successor labor agreement to replace the existing labor agreement which was to expire on April 30, 2006. Schofield, a registered nurse, became a member of the Union after she had assumed a full-time staff position with the Respondent in June 2004. Schofield also became a union representative on the Union's negotiating team and on its collective-bargaining agreement labor management committee. Schofield worked in the special procedures unit and the gastrointestinal (GI) unit of the Hospital. The Union has represented the registered nurses (RNs) since 1994. It also represents a separate unit for the technical employees at the Hospital. On April 13, 2006, the parties began negotiations for a successor labor agreement but did not reach agreement until March 22, 2007, several months after the labor agreement had expired. According to a letter sent by Respondent to the RN unit employees on April 2, 2007, negotiations were difficult and contentious. On March 22, 2007, a decertification petition was filed. In its letter of April 2, 2007, to the employees in the nurses' bargaining unit, which was signed by Chief Executive Officer (CEO) Sam Kaufman, Chief Nursing Officer (CNO) Marcey Jorgenson, and Chief Operating Officer (COO) Mark Crawford, Respondent hailed the filing of the decertification petition on February 22, 2007, as the day "the future arrived" at

Respondent. Respondent also hired a labor consultant. During this period the parties were campaigning for their respective positions with Respondent in favor of the decertification of the Union and the Union opposing it. Commencing in April 2006, Schofield became more active on behalf of the Union and was one of five nurses who labeled themselves as the "truth squad" and prepared and circulated literature on behalf of the Union's position on the ongoing contract bargaining. The literature contained their photographs as well as their statements in favor of the Union's position. It is undisputed and I find significant that prior to April 2006, Schofield had an unblemished record as an employee of Respondent and had never been disciplined. However, she soon received discipline in the form of written and verbal warnings and ultimately was discharged allegedly for insubordination because of her refusal to take responsibility for a patient.

In early May 2006, when Schofield arrived at the GI lab, she encountered recovery nurse Cathy Ruis and admitting nurse Georgene Kreger, who were upset that a doctor's office had not been getting his schedules in on time which was causing scheduling problems in the GI lab. Schofield and technician Tony Robinson, using separate telephone handsets, called the physician's office and talked to his scheduler and explained the problem. The scheduler transferred the telephone call to the office manager who listened to the explanation of the problem and said, "OK." Schofield testified that no harsh words or rudeness were exchanged. I credit her testimony which was unrebutted as neither Robinson nor the scheduler nor the office manager were called to testify. It was almost a month later that Schofield received a warning for this incident from Matt Grimes (who was, then the head of ancillary services and risk management which includes special procedures and the GI lab) for failing to follow the chain of command in contacting the doctor's office. This warning was issued to Schofield the same time as a written verbal warning for an incident which occurred in the late half of May for the alleged failure of Schofield to inform the director of biomedical engineering that a part had arrived. Schofield testified she had signed for the box containing the part while she was in the GI lab and that normally it was the responsibility of the radiology techs to go through the packages and deliver them. Grimes issued the written verbal warning to her for both incidents. He told Schofield that it was her responsibility to know what she was signing for. Grimes was not called to testify in this proceeding.

Subsequently in June, Schofield's wallet was missing and she was required to change bank accounts and file a new direct deposit form. She went to Respondent's human resources office and spoke to a clerical employee named "Romina." Schofield testified she tried to explain what she needed but Romina spoke over her and would not look at the letter she had brought from the bank. She also testified that Romina was rude. Schofield then went to the office of Human Resource Representative Angie Davidson and explained the situation and complained about the rude treatment she had received from Romina. Davidson explained what was needed for the direct deposit and apologized to Schofield for Romina's conduct. However, Grimes issued a written warning to Schofield on July 3, 2006. He told Schofield that he had received an e-mail from human resources ordering him to discipline Schofield. He did not tell her who had ordered the discipline. Schofield explained what had happened and Grimes told her she could issue a rebuttal. She did but the discipline was not changed. As noted above, Grimes was not called to testify in this proceeding.

On July 6, 2006, Schofield poured a soda from the soda machine near the emergency department (ED). CEO Kaufman was present in the ED kitchen and saw this. Shortly thereafter Grimes called Schofield to his office and issued her a verbal warning dated July 7, 2006, and told her that Kaufman did not want her to get soda from the ED diet kitchen. Grimes also gave Schofield a memo dated July 7, 2006, from Jane Nash, the radiology manager, which advised employees, "the ER fountain drink machine is for use by EMT personnel and available for the patients and the patient families." Schofield testified she told Grimes that he was "kidding" her. She testified that employees from radiology, special procedures, and the ED use soda from that machine daily. I credit Schofield's testimony in this regard which was unrebutted as Grimes did not testify. The record supports a finding that the Hospital had never previously disciplined either Schofield or other employees for using the soda machine.

Analysis

Disparate treatment may be inferred from the circumstances. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Unlawful motivation may be inferred from the evidence in the absence of direct evidence of animus. *New Otani Hotel & Garden*, 325 NLRB 928 (1998). It is well settled that an employer's failure to conduct a meaningful investigation of the alleged wrongdoing of the employee who is under scrutiny and the failure to give the employee an opportunity to explain his conduct is an indication of discriminatory intent. *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471 (1998). If the reasons for the decision advanced by the employer are shown to be pretextual, the Board may infer that the true motivation for the discipline was unlawful. *Bardaville Electric, Inc.*, 309 NLRB 337 (1992). Timing alone may suggest anti-union animus as the motivation for discharge. *Masland Industries,* 311 NLRB 184 (1993). The discipline of an employee violates Section 8(a)(3) of the Act when there is evidence that the employer has seized upon union activity to justify changing its previous tolerant policy toward the employee. *Gravure Packaging, Inc.*, 321 NLRB 1296 (1996).

I find the foregoing instances of discipline support the unrebutted testimony of Schofield and the conclusion that Respondent was seizing on any opportunity to discipline Schofield. It is significant that in each instance there was little or no investigation of the incident but rather Respondent issued the discipline to Schofield without giving her an opportunity to answer these charges before imposing discipline. I also find significant Schofield's testimony that Grimes told her the management of Respondent had told him to watch her. I credit Schofield's testimony which was unrebutted as Grimes was not called to testify. I thus conclude that the issuances of the foregoing disciplines were motivated by Respondent's determination to rid itself of a leading union advocate who had become a source of irritation for Respondent.

The Termination of Christina Schofield

On September 27, 2006, Schofield was assigned to work in the gastrointestinal (GI) lab as the procedure nurse along with Georgene Kreger who served as the admissions nurse and Kathy Ruis who served as the recovery room nurse. She arrived at the lab around 7:30 a.m. and assisted in a procedure which was concluded about 8:45 a.m. Recovery room nurse Ruis then took over the responsibility for the patient. Schofield then went to the cafeteria for coffee and returned to the GI lab about 9:15 or 9:20 a.m. Upon her return she was met by nurse Ruis who told her that Nursing Supervisor Alice Kelly had come by the GI lab and said that there was an emergency department (ED) patient that Kelly wanted taken report on. To "take report" is to accept primary responsibility for the patient. Schofield testified that she said, "Oh No," and that she could not take the patient because she was to assist in a procedure at 10 a.m. that morning. Schofield testified that ED nurse Traci Cornelison then came in with the patient's chart and asked Schofield where the patient would be put. Schofield told Cornelison that she could not take report on the patient as she had to assist with procedures in the GI lab. Cornelison said, OK and then left. Schofield testified that Ruis did not say anything. Schofield then went to the area where nurse Kreger was and told her that the management was going to assign an ED patient to the GI lab. Kreger said she could not and would not take the patient because she lacked ED skills. Schofield testified that she did not at any time tell Ruis or Kreger to refuse to take the patient. Kreger testified she told Schofield she would not take the patient. Ruis was not called to testify.

Schofield returned to the GI lab and met Kelly there who told her she (Schofield) must take the patient. Schofield told Kelly she could not take the patient as she could not do procedures and be responsible for primary care of an ED patient. Kelly repeated that Schofield must take report for the ED patient and Schofield said she would not do so. Kelly also informed Schofield that the patient was scheduled for a procedure later that day in the GI lab for the removal of a foreign substance. Schofield testified that she was concerned that the patient might choke in another room while she was assisting in a procedure. At that point Kelly told Schofield she was in "charge." Schofield asked when this had happened. A charge nurse is a supervisory employee outside of the bargaining unit and receives a higher rate of pay than a registered nurse in the bargaining unit. Schofield had never been told she was a charge nurse and had never received charge nurse pay. Kelly again said that Schofield was in charge and that Schofield must take responsibility for the patient. Schofield said she would not risk the patient's life and her nursing license. Kelly left but returned shortly thereafter with Chief Nursing Officer Jorgenson. This was about 20 minutes prior to the next procedure scheduled for 10 a.m. Jorgenson asked what Schofield was doing. Schofield said she was preparing for the procedure. Jorgenson said she (Schofield) was not doing anything. Schofield said she was getting ready for the procedure. Jorgenson told Schofield she must take the patient. Schofield said she could not do so for the good of the patient as she would be assisting with the 10 a.m. procedure. Jorgenson told Schofield she must take report on the patient or go home. Schofield said she would go home. According to Schofield, neither Jorgenson nor Kelly asked Kreger or Ruis to take the patient. When Jorgenson returned shortly thereafter, Schofield told her she would not set a precedent of taking on another patient while running the GI lab as this would risk the patient's safety. On Thursday, September 28, 2006, Respondent called Schofield and told her there would be a meeting on September 29 to discuss her situation.

Jorgenson testified that she was informed by Supervisor Alice Kelly that Ruis had already agreed to take report on the patient in the ED. Schofield testified that Kelly and Jorgenson had asked her to take report for the patient in the ED. Jorgenson testified that Schofield, herself, was not asked to take report on the ED patient but was preventing Ruis from taking report. Jorgenson testified that Schofield was in charge of the procedure department. However, Schofield was not a charge nurse, did not receive charge nurse pay, and consequently did not have the authority to order either Ruis or nurse Kreger not to take report for the ED patient. Schofield testified that she herself was asked to take report for the patient and told both Kelly and Jorgenson that she could not take report for the ED patient because she was the procedure nurse and was scheduled to assist in a procedure at 10 a.m. that morning in approximately 20 minutes. Upon Schofield's refusal to take the ED patient, Jorgenson sent her home. Jorgenson assigned two nurses to assist with the 10 a.m. procedure, and the ED patient was not transferred to the procedure department until shortly prior to her scheduled time for a procedure. On September 28, 2006 (the very next day), Respondent's recovery supervisor, Ramona J. Chatman, created an e-mail in which she contended that Schofield was a charge nurse although she had never received charge nurse pay. I find the creation of this was designed to bolster Respondent's contention that Schofield was a charge nurse who had ordered nurse Ruis not to take report although Ruis had agreed to do so on the request of Supervisor Alice Kelly. Neither Ruis nor Kelly were called to testify in this proceeding.

Respondent introduced into evidence, statements taken by Respondent on its behalf with respect to the events of September 27, 2006. To this end statements were taken from recovery nurse Ruis, admitting nurse Kreger, ED nurse Traci Cornelison, and house nurse Kelly by Respondent's director of human resources, Robert Taylor, and from CNO Jorgenson. However, Respondent did not call Cornelison, Kelly, or Ruis to testify. While the statements of these individuals tended to support Respondent's position with respect to the events of September 27 when Schofield refused to take the ED patient, they were not conclusive and these individual's credibility was not tested by cross-examination by the General Counsel and the Charging Party's counsel. Thus, there remains doubt as to which version is the accurate one. If in fact Schofield was truly under the impression that she was being asked or ordered to personally undertake the case of the ED patient in addition to performing as the procedure nurse, for a procedure that was expected to start in 20 minutes, this does clearly appear unreasonable.

With respect to Respondent's contention that it was only ordering Schofield to permit nurse Ruis to take the ED patient and that Schofield was exercising her authority as a charge

nurse, I find this contention is implausible as the evidence is overwhelming that she was not a charge nurse and did not receive any increment in pay as a charge nurse. Consequently, Schofield had no authority to direct nurse Ruis to refrain from taking the ED patient. Clearly, Kelly and Jorgenson had the authority to order Ruis to take report for the ED patient while Schofield was left to attend the patient who was scheduled to undergo a procedure at 10 a.m.

In evaluating the testimony of Schofield and Jorgenson concerning precisely what was said during the discussion concerning whether the ED patient could be brought into the procedure department, I find it unlikely that Schofield was acting as a charge nurse refusing to let the other nurses take the ED patient. I find it was significant that Respondent did not call Ruis as a witness if her testimony would have supported Respondent's position that she had agreed to take the ED patient but had been ordered by Schofield not to do so. Moreover, even if Schofield had ordered Ruis not to take the ED patient, either Kelly or Jorgenson had the authority to overrule Schofield's order and to order Ruis to take report for the ED patient.

Jorgenson and Human Resource Director Robert Taylor met with Schofield and Union Representative Ann Wagner on September 29. Jorgenson opened the meeting and asked Schofield who had ordered her to assume the care of the ED patient. Schofield said that Jorgenson had done this. Jorgenson asked why she had concluded this. Schofield said it was Jorgenson's statement that she must take the patient for the good of the Hospital. Jorgenson then told Schofield that Ruis had agreed to take the ED patient but that Schofield had told her not to do so. Schofield denied this. At this point Jorgenson and Taylor left the room to caucus. They returned and told Schofield that the Respondent was "severing relations" with her. She was thus discharged at this time.

Analysis

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the initial burden to establish that:

1. The employee engaged in protected concerted activities.
2. The employer had knowledge or at least suspicion of the employee's protected activities.
3. The employer took adverse action against the employee.
4. A nexus or link between the protected activities and the adverse action underlying motive.

Once these four elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence that it took the action for a legitimate nondiscriminatory business reason. In *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), the Board said that once the General Counsel makes a prima facie case that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In the instant case, it is clear, and I find, that Christina Schofield was engaged in protected concerted activity. She was a known active union adherent who had incurred the displeasure of Respondent and had been punished for her support of the Union by the unlawful warnings issued to her and was discharged in September 2006. She served on the Union's bargaining team upon her appointment to it in April 2006. She had appeared in photographs and in print on union literature which she distributed to employees by placing it on union bulletin boards after obtaining permission from Respondent to do so. CEO Kaufman and CNO Jorgenson were both aware of Schofield's engagement in protected union activity. I find Respondent's antiunion animus was the motivating reason for the discipline and discharge of Schofield.

Not only was Schofield subjected to unwarranted discipline after April 2006, she was also excluded from attending hospital retreats for medical personnel and management which she had previously attended as a guest of Dr. Mohammed Amad who was on the staff. She was warned by Manager Matt Grimes that he had been told to watch her. Schofield also testified that Respondent's outside labor consultant, Brent Yessen, followed her on the premises and would attempt to engage her in conversations about the Union. The timing of all of the above within the April to September 29, 2006 period, supports the inference of Respondent's unlawful motivation in its discipline and discharge of Schofield.

See *Hialeah Hospital*, 343 NLRB 391, 394 (2004), regarding retaliatory discharge. See *Cox Communications Gulf Coast, L.L.C.*, 343 NLRB 164, 164 (2004), finding that the reason for a discharge was pretextual and supported an inference that the discharge was in retaliation for the employees' union activity, citing *Shattuck Denn Mining Corp.,* supra, and *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

I conclude that the General Counsel has established a prima facie case of a violation of Section 8(a)(3) and (1) of the Act. Schofield was engaged in protected concerted activities on behalf of the Union; the Respondent had knowledge of her protected activities; the Respondent had antiunion animus and took adverse actions against Schofield. A nexus or link has been established between Schofield's protected concerted activities and Respondent's knowledge thereof and the adverse action taken against Schofield by her discharge allegedly for "insubordination." I find that Respondent has failed to rebut the prima facie case by the preponderance of the evidence and has failed to demonstrate that it would have disciplined and discharged Schofield in the absence of her engagement in the protected concerted activities, *Wright Line*, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7), and (14) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) and (3) of the Act by the issuance of the above warnings issued to Christina Schofield.
4. Respondent violated Section 8(a)(3) and (1) of the Act by its discharge of Christina Schofield.

THE REMEDY

Having found that the Respondent has engaged in the above violations of the Act, it shall be recommended that Respondent

cease and desist therefrom and take certain affirmative actions designed to effectuate the policies and purposes of the Act and post the appropriate notice. It is recommended that Respondent cease the issuance of the unlawful warnings and discipline and rescind the warnings and the discharge of Christina Schofield and offer immediate reinstatement to Schofield. Schofield shall be reinstated to her prior position or to a substantially equivalent one if her prior position no longer exists. She shall be made whole for all loss of backpay and benefits sustained by her as a result of the Respondent's unfair labor practices. All of the backpay amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing unlawful verbal and written warnings to its employees because of their engagement in protected concerted activities.

(b) Discharging its employees because of their engagement in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order rescind the warnings issued to registered nurse Christina Schofield and the discharge of Schofield and offer her full reinstatement to her former job or if that job no longer exists, to a substantially equivalent job without prejudice to her seniority or any other rights or privileges previously enjoyed, and expunge from its files the unlawful warnings and discharge issued to Schofield.

(b) Make whole Schofield for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest.

(c) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order

(d) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"[3] at its facility in Las Vegas, Nevada. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2006.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."